STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ELIOT SPITZER
Attorney General

(212) 416-8050

May 9, 2002

Senator Charles E. Schumer
SH-313 Hart Senate Office Building
Washington, D.C. 20516-3202

Senator Hillary Rodham Clinton
SR-476 Russell Senate Office Building
Washington, D.C. 20510-3203

Dear Senators Schumer and Clinton:

I write to share with you my concern about the threat that H.R. 3005, the "Bipartisan Trade Promotion Authority Act of 2001," poses to the federal, state and local governments' authority to protect public health and the environment, and to offer some ways to address this threat. This concern should not derail efforts to expand fair and free trade. My staff has spoken with your staffs and I know that you are both following this issue closely.

H.R. 3005 is intended to facilitate international trade agreements by establishing a fast track procedure whereby a trade agreement submitted to Congress for approval must be voted up or down and cannot be amended. To advance this end, the bill creates framework principles for U.S. trade negotiators to follow in negotiating bilateral or multilateral agreements with foreign countries.

One of the proposed provisions, which is intended to protect foreign investments from expropriation, is so broadly drawn as to potentially grant foreign, *but not U.S.*, investors compensation rights far *greater* than those available under American constitutional takings and due process law. Such a provision in the North American Free Trade Agreement ("NAFTA"), which was enacted under "fast track" legislation comparable to H.R. 3005, has resulted in claims alleging expropriation by federal, state or local regulation. These claims, which total in the billions of dollars, are adjudicated in closed proceedings conducted by arbitration panels that are not bound by U.S. judicial precedent or the rulings of other arbitration panels. The panels' determinations are not subject to appeal on the merits and any compensation award is payable directly from the U.S. Treasury. Finally, public policy concerns of NAFTA's signatory nations

play no part in this process since the foreign investor does not need the approval of its own country as a pre-condition to filing a compensation claim. Rather, the decision to file the claim and the ultimate resolution thereof are predicated solely on private economic impacts.

In response to H.R. 3005, on March 22, 2002, the National Association of Attorneys General ("NAAG"), representing 54 states and territories, passed the attached resolution expressing concern over the inclusion of provisions in international trade agreements that grant individual foreign investors new rights to challenge and seek compensation for state, local or federal government regulatory actions as "expropriations."

NAAG's concerns arise from direct experience with Chapter 11 of NAFTA. That provision has raised serious concerns over its impact on the power of government to act to protect health, welfare and the environment.

> Chapter 11 mandates compensation for disappointed investors from other countries under a vague standard potentially much more expansive than that available to domestic investors who claim a regulatory taking. In particular, the provision effectively would require the federal government to assume liability for enforcement of federal, state and local environmental regulations. *See Methanex v. United* States ($1 billion expropriation claim filed by Canadian manufacturer of MTBE based on California's decision to ban the gasoline additive in order to protect groundwater); *Metalclad v. Mexico* ($17 million award against Mexico based on local government's refusal to approve sitting of a hazardous waste facility – arbitration panel ruled, in part, that local government lacked permit authority over the facility despite the government of Mexico's contrary assertion).
>
> The "measure" for which compensation is required may include any "law, regulation, procedure, requirement or practice." In fact, claimants under Chapter 11 have claimed compensation for the statements of government officials in debates over legislation, *see Ethyl Corp. v. Canada*, and for punitive damages imposed by a Mississippi state court on a company partially owned by foreign investors. *See Loewen Group v. United States*.

Actual and potential compensation awards predicated on a violation of international trade agreements will no doubt have a chilling effect on promulgation and enforcement of health and environmental regulations. Although the NAFTA arbitration panels do not have authority to set aside public health and environmental regulations they deem violative of international trade agreements, and only the U.S. Treasury is liable for the payment of a compensation award, nevertheless, "regulatory expropriation" awards under NAFTA present a profound challenge to our ability to protect the public health and environment and to our Nation's sovereign interests. Moreover, substantial awards payable by the U.S. Treasury may ultimately prompt Congress to pass those costs, directly or indirectly, onto the "offending" state or to have the offending regulation declared invalid. *See* NAFTA Implementation Act, 19 U.S.C.A. § 3312(b)(2) (allowing United States to bring lawsuit to declare state or local regulation invalid).